SUPREME COURT, U. S.

FILED

SEP 30 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-353

DR. EDWARD F. SCHUBERT,
Petitoner,

v.

MICHAEL JOHN KOVACH, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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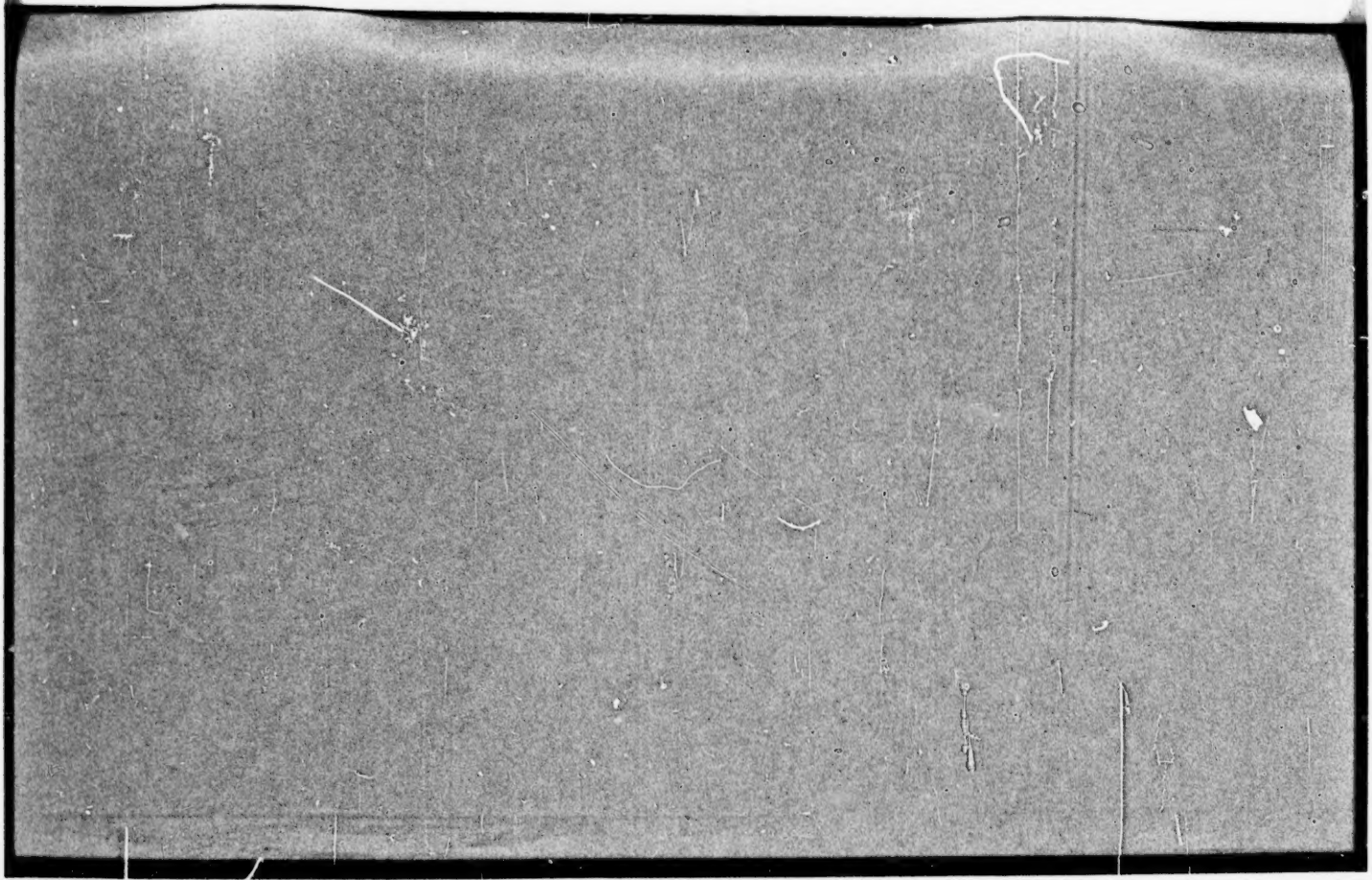

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IN THE

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No.

DR. EDWARD F. SCHUBERT,
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v.

MICHAEL JOHN KOVACH, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

The petitioner above named respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Wisconsin entered in this proceeding on July 3, 1974.

OPINION BELOW

The opinion of the Supreme Court of Wisconsin is reported as *State ex rel. Kovach v. Schubert* at 64 Wis. 2d 612 and 219 N.W. 2d 341. A copy of such opinion is printed in the Appendix hereto.

JURISDICTION

The judgment and opinion of the Supreme Court of Wisconsin was dated and entered on July 3, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Do the provisions of sec. 971.17 (1), Wis. Stats., providing for the automatic commitment of criminal defendants found not guilty by reason of mental disease or defect without a hearing to determine present mental state and need for commitment, violate the Equal Protection and Due Process Clauses of the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article XIV of Amendments:

> "Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Wisconsin Statutes

Section 971.17:

> **Legal effect of finding of not guilty because of mental disease or defect.** (1) When a defendant is found not guilty by reason of mental disease or defect, the court shall order him to be committed to the department to be placed in an appropriate institution for custody, care and treatment until discharged as provided in this section.

"(2) A reexamination of a defendant's mental condition may be had as provided in s. 51.11, except that the reexamination shall be before the committing court and notice shall be given to the district attorney. The application may be made by the defendant or the department. The burden shall be on the defendant to prove that he may safely be discharged or released without danger to himself or others. If the court is so satisfied, it shall order the discharge of the defendant or his release on such conditions as the court determines to be necessary. If it is not so satisfied, it shall recommit him to the custody of the department.

"* * *"

STATEMENT OF THE CASE

In June of 1971 a criminal complaint was filed in the County Court for Ashland County, Wisconsin, alleging that the respondent, Michael John Kovach, Jr., had violated the provisions of secs. 943.01 (2) (b) and 940.23, Wis. Stats., relating to criminal damage to property belonging to a public utility and injury by conduct regardless of life. Following a preliminary hearing, probable cause was found that the respondent had committed the offenses, and he was committed for a sixty-day observation period to Mendota State Hospital. It was determined by the hospital psychiatrists that while the respondent was competent to stand trial, he was at the time of the crime suffering from a mental disease or defect such that he could not appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. In September, 1971, the respondent entered a plea of not guilty by reason of mental disease or defect and, upon stipulation of counsel and the approval of the court, the respondent was adjudged not guilty by reason of mental disease or defect. Pursuant to sec. 971.17 (1), Wis. Stats., the respondent was committed to Central State Hospital where he remains at the present time.

On August 22, 1973, the respondent commenced this original action for writ of habeas corpus in the Supreme Court of Wisconsin. In his petition for such writ, the respondent alleged that his commitment pursuant to the provisions of sec. 971.17, Wis. Stats., was unconstitutional in that such provisions were "contrary to the Due Process and Equal Protection provisions of the Fourteenth Amendment to the United States Constitution."

The respondent's petition for writ of habeas corpus was argued before the Supreme Court of Wisconsin on May 8, 1974. On July 3, 1974, the court announced its decision with three justices dissenting. That decision concluded with the following judgment:

> "*By the Court.* — The provisions of sec. 971.17 (1), Stats., providing for automatic commitment without a hearing to determine present mental state and need for commitment, violate the equal protection and due process clause of the United States Constitution; determination of present mental illness shall be made in all prosecutions either pending or not instituted; other relief denied to this petitioner."

REASONS FOR GRANTING THE WRIT

I. This Case Presents An Opportunity For This Court To Address Itself To An Issue Of Substantial Constitutional Significance Which Has Not Heretofore Received This Court's Attention.

In a number of cases during the last ten years this Court has considered the question of the constitutionality of procedures relating to various types of mental commitments arising out of criminal proceedings. In *Baxstrom v. Herold* (1966),

383 U.S. 107, 86 S.Ct. 760, 15 L.Ed. 2d 620, this Court held that the petitioner was denied the equal protection of the laws by a statutory procedure under which a criminal defendant could be civilly committed at the expiration of his penal sentence without the procedural protections provided to other persons civilly committed. In *Specht v. Patterson* (1967), 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed. 2d 326 this Court held that the Due Process Clause required a meaningful hearing before commitment under Colorado's Sex Offender Act. The question of whether or not the denial of a jury trial in the hearing required by *Specht*, when such jury trial was available in civil commitment hearings, constituted a denial of the equal protection of the laws was discussed but not actually decided in *Humphrey v. Cady* (1972), 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed. 2d 394. Finally, in *Jackson v. Indiana* (1972), 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed. 2d 435, this Court found violations of both the Equal Protection and Due Process Clauses of the United States Constitution in a procedure for the commitment of a criminal defendant found incompetent to stand trial, where such commitment was effected without the procedural safeguards afforded individuals civilly committed and where the nature and duration of such commitment bore no reasonable relation to the purpose for which the individual was committed.

Thus, this Court has in recent years addressed itself to the issue of the constitutional validity of various commitment procedures arising out of criminal proceedings. In so doing, this Court has indicated that it considers such issue to be of substantial constitutional significance.

In the last three cases cited above this Court was confronted with the question of the constitutional validity of two major types of mental commitments arising out of criminal

proceedings. They are the commitment of sex offenders and the commitment of criminal defendants who are incompetent to stand trial. However, there is another major type of commitment arising out of criminal proceedings. That is the commitment of criminal defendants who are found not guilty by reason of mental disease or defect. This Court has not in any case considered the issue of the constitutional validity of the procedures utilized in such commitments.

It is that issue which is raised by the present case. Thus, this case presents an opportunity for this Court to address itself to an issue of substantial constitutional significance which has not heretofore received this Court's attention.

II. The Issue Raised By This Case Has Substantial Import For A Significant Number Of American Jurisdictions.

This case involves the issue of the constitutional validity of statutory procedures relating to the commitment of a criminal defendant who is found not guilty by reason of insanity. Such issue is of more than local concern to the state of Wisconsin. It has substantial import for a significant number of American jurisdictions.

The Wisconsin statute found unconstitutional in this case provides for the automatic commitment of defendants acquitted on grounds of insantiy. At least thirteen states have similar statutes which provide for such automatic commitment. See Colo. Rev. Stat. Ann. §39-8-4(2) (a) (Supp. 1969); Ga. Code Ann. §27-1503 (1972 rev.); Kan. Stat. Ann §22-3428 (Supp. 1973); Me. Rev. Stat. Ann. Tit. 15, §103 (1964); Mich. Compiled Laws Ann. §767.27b (1968); Minn. Stat. Ann. §631.19 (Supp. 1974); Mo. Ann. Stat. §552.040 (1) (Supp. 1974);

Mont. Rev. Codes Ann. §95-508(a) (Supp. 1973); Neb. Rev. Stat. §29-2203 (1964); Nev. Rev. Stat. §175.521 (1973); N.Y. Crim. Proc. Law §330.20 (1971); Ohio Rev. Code Ann. §2945.39 (Supp. 1972); Va. Code Ann. §19.1-239(1) (Supp. 1974). Thus, the decision of the Wisconsin Supreme Court directly brings into question the validity of those statutes.

Furthermore, that decision has potential impact on the statutory procedures for the commitment of criminal defendants acquitted on grounds of insanity in a substantial number of other American jurisdictions. The Wisconsin Supreme Court found the statutory procedures in question to deny equal protection of the laws because commitments of defendants acquitted on grounds of insanity were effected without the determinations which must be made in connection with civil commitments. It further found those procedures to deny due process of law because of the absence of a full hearing on the defendant's present mental condition. In a significant number of American jurisdictions a criminal defendant acquitted on grounds of insanity may be committed either at the discretion of the trial judge or after a summary inquiry into the acquitted person's present mental condition. Note, *Commitment Following Acquittal by Reason of Insanity and the Equal Protection of the Laws*, 116 U. Pa. L. Rev. 924; Note, *Acquittal by Reason of Insanity: Is Mandatory Commitment Constitutional?*, 39 U.M.K.C.L. Rev. 213. If the decision of the Wisconsin Supreme Court in this case is correct, then there would be serious question about the constitutional validity of such procedures.

Thus, there can be no doubt that the issue presented by this case is of national significance. The resolution of that issue by this Court would have a direct and substantial impact

on the procedures established in a large number of American jurisdictions for the commitment of criminal defendants who are found not guilty by reason of insanity.

III. The Split Of Authority With Respect To The Issue Raised By This Case Necessitates A Resolution Of This Issue By This Court.

A significant number of appellate courts have considered the issue of the constitutional validity of procedures relating to the commitment of criminal defendants found not guilty by reason of insanity. Those appellate courts have found themselves in disagreement on the question of whether such procedures are consonant with the requirements of the Equal Protection and Due Process Clauses of the United States Constitution.

Prior to this Court's decision in 1966 in *Baxstrom v. Herold, supra,* there were few, if any, challenges made to statutory procedures providing for the commitment of criminal defendants acquitted by reason of insanity on the ground that such procedures were in contravention of the equal protection clause. However, subsequent to that decision such challenges were made in a number of cases. Those cases have resulted in a division of authority with respect to the question of whether such procedures violate the equal protection clause.

On the one hand, several courts have found a denial of equal protection in the statutory provisions relating to the commitment of criminal defendants found not guilty by reason of insanity. In *Bolton v. Harris* (1968), 130 App. D.C. 1, 395 F. 2d 642, the District of Columbia Circuit Court of Appeals held that the statutory provisions providing for the automatic commitment without a hearing of an individual

acquitted by reason of insanity, when such hearing was provided in civil commitments, constituted a denial of equal protection of the laws to a person so committed. In the present case, the Wisconsin Supreme Court found a denial of equal protection of the laws in statutory provisions which provided for automatic commitment without the determinations made in connection with a civil commitment. Similarly the Supreme Court of Arizona found that a statutory schema providing procedures for the commitment and release of one acquitted by reason of insanity which substantially differed from the procedures required in civil commitments violated the equal protection clause. *State v. Clemons* (1973), 110 Ariz. 79, 515 P. 2d 324.

On the other hand, the majority of courts which have considered the matter have rejected the contention that the Equal Protection Clause invalidates commitments of those acquitted by reason of insanity when those so committed are not afforded the same procedural protections and determinations required in civil commitments. Thus, in *People v. Lally* (1966), 19 N.Y. 2d 27, 277 N.Y.S. 2d 654, 224 N.E. 2d 87, the Court of Appeals of New York rejected the claim that the automatic commitment of a person held not guilty because insane violated such person's right to the equal protection of the law. Likewise, the Supreme Court of Delaware in *Mills v. State* (Del. 1969), 256 A. 2d 752, concluded that differences between the procedures in civil commitments, on the one hand, and commitments resulting from an adjudication of acquittal on grounds of insanity, on the other, do not infringe upon the equal protection guaranty. Similarly, in *Chase v. Kearns* (Me. 1971), 278 A. 2d 132, the Supreme Judicial Court of Maine found no denial of equal protection of the laws in the distinctions in commitment and release provisions applying to those acquitted because of a mental disease or defect. The Supreme Court of

California also rejected the contention that California's commitment and release procedures for those acquitted by reason of insanity ran afoul of the Equal Protection Clause because those procedures were substantially different from civil commitment procedures. *In re Franklin* (1972), 7 Cal. 3d 126, 101 Cal. Rptr. 553, 496 P. 2d 465.

In addition to the split of authority on the equal protection issue, there has also developed a division of authority with respect to the question of whether or not statutory provisions requiring the automatic commitment of a person who is found not guilty by reason of insanity deny to such person due process of law. Prior to the decision in the present case, the courts of this country have uniformly held that due process is not offended by automatic commitment of such persons, provided that adequate opportunity is afforded for a subsequent hearing on the question of release or discharge. See Annot., 50 A.L.R. 3d 144, §3, and cases cited therein. However, in the present case the Wisconsin Supreme Court departed from that uniform holding and concluded that due process required a full hearing on a defendant's present mental condition before he could be committed. Thus, this decision creates a split of authority among the states on the question of whether or not automatic commitment provisions violate the Due Process Clause.

The division among the state courts on the question of the constitutional validity of statutory procedures relating to the commitment of criminal defendants found not guilty by reason of insanity renders it imperative that this Court address itself to this question. Presently, in some jurisdictions, such as Wisconsin, the legislative determination that automatic commitment of persons found not guilty by reason of insanity is necessary for the protection of the public has been frustrated by the judicial declaration that such commitment is

unconstitutional. In a substantial number of other jurisdictions that legislative determination has remained unchallenged or withstood attack, and in those jurisdictions criminal defendants continue to be subject to automatic commitment upon a finding of not guilty by reason of insanity.

Thus, whether the decision in the present case is correct or not, there is a real need for resolution of this issue by this Court. If the decision in the present case is correct, criminal defendants in many states who are committed upon a finding of not guilty by reason of insanity are being deprived of their constitutional rights. If the decision in the present case is incorrect, as the petitioner submits that it is, then the people of those jurisdictions such as Wisconsin where automatic commitment statutes have been struck down as unconstitutional have been deprived of a significant protection against individuals who have been shown to be dangerous as a result of mental illness. In either case, it is essential that this Court resolve this issue.

IV. The Decision Of The Supreme Court Of Wisconsin In This Case Is Erroneous.

A. Automatic commitment of a criminal defendant who is found not guilty by reason of mental disease or defect does not violate the Equal Protection Clause.

Section 971.17 (1), Wis. Stats., the statute at issue in this case, provides for the automatic commitment of criminal defendants who are found not guilty by reason of mental disease or defect without the determinations made in connection with a civil commitment under Ch. 51, Wis. Stats.

The Supreme Court of Wisconsin concluded that such distinction in procedure constitutes a denial of equal protection of the laws to persons committed under sec. 971.17 (1).

The test of whether or not differences in procedure in mental commitment proceedings run afoul of the Equal Protection Clause of the United States Constitution was stated by this Court in *Baxstrom v. Herold, supra.* This Court stated:

> "... Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. . . ." 383 U.S. at 111, 86 S.Ct. at 763.

Thus, in order to determine whether a person committed pursuant to sec. 971.17, Wis. Stats., has been denied equal protection of the laws, one must determine whether some rational basis exists which would justify the difference in rights afforded such a person as compared to those afforded a person civilly committed under Ch. 51, Wis. Stats.

Before the automatic commitment procedures of sec. 971.17 can be invoked, the person to be committed must have been found to be guilty of criminal conduct and must have established to a reasonable certainty by the greater weight of the credible evidence that he was not responsible for such criminal conduct because of a mental disease or defect. Section 971.15, Wis. Stats. The person committed under sec. 971.17 is thus distinguishable from a person committed under Ch. 51, Wis. Stats., in two ways. First, the determination that the person committed under sec. 971.17 has engaged in criminal conduct and thus constitutes a threat to the public safety distinguishes such person from a person civilly committed with respect to whom no such determination has been made and who constitutes at most only a potential danger.

Second, the fact that there has been a determination that a person committed under sec. 971.17 was suffering from a mental illness at the time he engaged in criminal conduct distinguishes that person from the person potentially subject to Ch. 51 civil commitment proceedings with respect to whom there has been no such prior determination of mental illness.

Those determinations made with respect to an individual committed under sec. 971.17 put such individual into an "exceptional class." *Chase v. Kearns, supra,* 278 A. 2d at 138. They provide a rational basis for the difference in the criminal commitment provisions of sec. 971.17 and the civil commitment provisions of Ch. 51. Since the person committed under sec. 971.17 has been determined to have already been a danger to the public safety as a result of his mental illness, his immediate commitment without the procedures which characterize a Ch. 51 civil commitment is justified as necessary to protect the public from harm. In addition, since the person committed under sec. 971.17 has been previously determined to have been mentally ill and to have engaged in criminal conduct as a result of that illness thus evincing his dangerousness, the operative facts which require commitment have already been determined and there is no need for the hearing which precedes a Ch. 51 civil commitment to insure against inappropriate commitment.

Thus, it is manifestly clear that there is a reasonable basis justifying the distinctions between commitments under sec. 971.17 and under Ch. 51. Therefore, under the test laid down in *Baxstrom v. Herold, supra,* a person committed under sec. 971.17 is not denied the equal protection of the laws.

The Supreme Court of Wisconsin in its decision in this case found that "the automatic commitment of persons found not guilty by reason of insanity is a denial to such persons

of the equal protection of the laws." Such finding was primarily based on that court's analysis of this Court's decisions in *Humphrey v. Cady, supra,* and *Jackson v. Indiana, supra.* It would be beyond the scope and purpose of this petition to engage in an exhaustive and detailed examination of that analysis and those decisions. Suffice it to say that those decisions do not in any way render untenable the petitioner's position that the determination that a person committed under sec. 971.17 *both* had committed criminal acts *and* was suffering from a mental disease or defect at the time of those acts places such a person in an "exceptional class" and justifies his immediate commitment without the hearing required in civil commitment proceedings.

B. Automatic commitment of a criminal defendant who is found not guilty by reason of mental disease or defect does not violate the Due Process Clause.

The Wisconsin Supreme Court found that a sec. 971.17(1) commitment which is effected without a hearing violates the Due Process Clause of the United States Constitution. The petitioner respectfully submits that such finding was erroneous.

The fundamental requisite of due process of law is the opportunity to be heard. *Goldberg v. Kelly* (1970), 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287. The petitioner concedes that if the automatic commitment provisions of sec. 971.17(1), Wis. Stats., provided no hearing at which the need for the continued detention of the person committed could be contested, then indeed there would be a violation of due process. But sec. 971.17 (2) provides for just such a hearing upon the request of the person committed. As noted by the Wisconsin

Supreme Court, the person "adjudicated not guilty by reason of insanity can initiate proceedings to be reexamined and perhaps released the moment he arrives at the Central State Hospital." *State ex rel. Schopf v. Schubert* (1970), 45 Wis. 2d 644, 654, 173 N.W. 2d 673, 678.

Thus, the issue in this case is not whether a hearing must be provided, but when such hearing must be provided. The question which must be decided is whether or not the Wisconsin statutory procedure, which fails to provide a precommitment hearing but does provide for a hearing on the need for continued commitment which may be immediately requested by the person committed, violates the due process guarantees of the United States Constitution.

The question of whether a certain procedure offends the Due Process Clause turns on whether such procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Commonwealth of Massachusetts* (1934), 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674. The petitioner submits that the procedure under consideration does not constitute a denial of due process under that test.

Far from offending some principle of justice regarded as fundamental, the automatic commitment of persons found not guilty by reason of insanity is in perfect harmony with the "traditions and conscience of our people." Such commitment simply reflects society's legitimate concern with its welfare. There can be no doubt that such persons present a real threat to the safety of the community. Furthermore, the finding of insanity implicit in the verdict of acquittal gives rise to a presumption that such insanity continues at the time of the commitment. 29 Am Jur. 2d, *Evidence*, §243, p. 290. As one court has indicated with respect to the automatic commitment of one found not guilty by reason of insanity:

> ". . . [I]n adjusting the delicate balance between a society's right to be protected from potentially mental ill and dangerous individuals, on the one hand, and the individual's right to be protected from improvident confinement on the other, it was not a denial of due process to commit the appellant under §4702 (a) by virtue of the presumption of continuing mental illenss and the jury's verdict, without a separate hearing and determination as to present mental condition. . . ." *Mills v. State, supra,* 256 A. 2d at 757.

In determining whether a practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" and thus violates due process, the fact that a practice is followed by a large number of states, while not conclusive, is plainly worth considering. *Leland v. Oregon* (1952), 343 U.S. 790, 798, 72 S.Ct. 1002, 1007, 96 L.Ed. 1302; *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 548, 91 S.Ct. 1976, 1987, 29 L.Ed. 2d 647. As shown *supra* in Part II, automatic commitment of those found not guilty on account of insanity is required by statute in a significant number of American jurisdictions. However, with the exception of the decision in this case, the courts which have considered this matter have uniformly concluded that due process is not offended by automatic commitment for a reasonable period. of persons acquitted by reason of insanity, provided that adequate opportunity is afforded for a subsequent full judicial hearing on the question of release or discharge. Annot., 50 A.L.R. 3d 144, and cases cited therein. Therefore, there appears to be no basis for concluding that such practice offends fundamental principles of justice.

Thus, there is no denial of due process in the automatic commitment procedures at issue in this case. The Supreme Court of Wisconsin erred in holding that there is.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and decision of the Wisconsin Supreme Court.

Respectfully submitted,

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No. St. 238

August Term, 1973

STATE OF WISCONSIN: IN SUPREME COURT

State ex rel. Michael John Kovach, Jr.,
Petitioner, FILED July 3, 1974

v.

Dr. Edward F. Schubert,
Supt., Central State Hospital,
Respondent.

ORIGINAL ACTION for writ of habeas corpus. *Relief declared but denied to petitioner.*

The petitioner, Michael John Kovach, Jr. (hereinafter petitioner), confined at Central State Hospital, brings this action to challenge the constitutionality of the statutory provisions for automatic commitment of a defendant who is found not guilty by reason of mental disease or defect, and for reexamination of such persons.

In June of 1971 a criminal complaint was filed in the Ashland county court alleging that the petitioner had violated the provisions of secs. 943.01 (2) (b), and 940.23, Stats., criminal damage to property belonging to a public utility and injury by conduct regardless of life. Following a preliminary hearing, probable cause was found that the petitioner had committed the offenses, and he was committed for a sixty-day

observation period to Mendota State Hospital. It was determined by the hospital psychiatrists that while the petitioner was competent to stand trial, he was at the time of the crime suffering from a mental disease or defect such that he could not appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. In September, 1971, the petitioner entered a plea of not guilty by reason of mental disease or defect and, upon stipulation of counsel and the approval of the court, the petitioner was adjudged not guilty by reason of mental disease or defect. Pursuant to sec. 971.17 (1), Stats.,[1] the petitioner was committed to Central State Hospital where he remains to the present time.

Since his commitment the petitioner has sought reexamination three times. One of these petitions was found to be untimely, but the other petitions were honored. After reexaminations, the reviewing court determined that the petitioner was still mentally ill and had not met the burden required by sec. 971.17(2), Stats.[2]

The petitioner, represented by the state public defender, now brings this writ of habeas corpus challenging the constitutional validity of the statute under which he was committed and was reexamined.

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[1] "(1) When a defendant is found not guilty by reason of mental disease or defect, the court shall order him to be committed to the department to be placed in an appropriate institution for custody, care and treatment until discharged as provided in this section."

[2] "(2) A reexamination of a defendant's mental condition may be had as provided in s. 51.11, except that the reexamination shall be before the committing court and notice shall be given to the district attorney. The application may be made by the defendant or the department. The burden shall be on the defendant to prove that he may safely be discharged or released without danger to himself or others. If the court is so satisfied, it shall order the discharge of the defendant or his release on such conditions as the court determines to be necessary. If it is not so satisfied, it shall recommit him to the custody of the department."

WILKIE, J. The issue presented is: Do secs. 971.17 (1) and (2), Stats., deny to the petitioner due process of law and the equal protection of the law in violation of the Fourteenth amendment to the United States Constitution?

The petitioner challenges the provisions of sec. 971.17, Stats., which provide for automatic commitment upon a finding of not guilty by reason of mental disease or defect without an adjudication of insanity at the time of commitment and the provisions for release which place upon the petitioner the burden of proving that he is now sane and that he may safely be discharged or released without harm to himself or others.

Equal Protection as to Commitment Procedures.

Commitment proceedings are civil and benevolent and thereby independent, to a certain extent, of the constitutional safeguards applied to deprivations of liberty involved in criminal proceedings. However, the trend in recent years has been toward a more rigorous protection of individual rights.

In 1966, in *Baxstrom v. Herold*[3] the United States Supreme Court held that a prisoner completing his sentence could not be committed without affording him all the procedural protections provided to other citizens involuntarily civilly committed. The court found that there "is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments" and that, therefore, the statutory scheme under scrutiny in that case denied to the petitioner the equal protection of the law.

The next year, in *Specht v. Patterson*,[4] the Supreme Court held that a prisoner committed under the Colorado Sex

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[3](1966), 383 U.S. 107, 86 Sup. Ct. 760, 15 L. Ed. 2d 620.

[4](1967), 386 U.S. 605, 87 Sup. Ct. 1209, 18 L. Ed. 2d 326.

Offenders Act was entitled by the Due Process Clause to a hearing where he would be present with counsel, have an opportunity to be heard, to be confronted with witnesses against him, to have the right of cross-examination and to offer evidence in his own behalf, and to have findings made which would be adequate for review. Wisconsin had already required such a hearing under its sex deviate statutes.[5]

In *Bolton v. Harris*,[6] the Court of Appeals for the District of Columbia applying the principles of *Baxstrom* declared that persons found not guilty by reason of insanity must be given a judicial hearing with procedures substantially similar to those in civil commitment proceedings. That court felt the *Baxstrom* case indicated that the commission of criminal acts does not give rise to a presumption of dangerousness which, standing alone, justifies substantial differences in commitment procedures and confinement conditions of the mentally ill.

In *State ex rel. Schopf v. Schubert*[7] the Wisconsin court was faced with a challenge to its statute providing for automatic commitment of persons found not guilty by reason of insanity. With a divided court, this court found that such a scheme did not deny equal protection of the law to such persons. The court confined the *Baxstrom* case to its facts and found it distinguishable from the provision of different procedures for civil versus criminal commitments. The court further held that the expansive interpretation of the holding of *Baxstrom* found in *Bolton v. Harris* was based on erroneous reasoning.

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[5]*Huebner v. State* (1967), 33 Wis. 2d 505, 147 N.W. 2d 646.

[6](D.C. Cir. 1968), 395 Fed. 2d 642.

[7](1970), 45 Wis. 2d 644, 173 N.W. 2d 673.

In *Jackson v. Indiana*,[8] the United States Supreme Court (in 1972) was faced with another challenge to a state commitment procedure. This time the validity of procedures for the commitment of persons found incompetent to stand trial were under scrutiny. The Supreme Court found that due process requires that the nature and duration of commitment bear some reasonable relation to the purpose of the commitment. Therefore, the Court mandated that persons charged with criminal offenses who are committed soley on account of their incapacity to stand trial cannot be held more than the reasonable time necessary to determine whether there is a substantial probability of their attaining that capacity in the foreseeable future. If there is no such probability such persons must be released or proceedings for civil commitment commenced. This mandate has been carried out by this court.[9]

However, another aspect of the *Jackson* case has not received similar attention. The Supreme Court also found that the petitioner had been denied the equal protection of the law by being subjected to more lenient commitment standards. The petitioner did receive a hearing at which he was represented by counsel. However, the Supreme Court found that the procedure under which he was committed was substantially different from that afforded to persons committed as insane or feebleminded. The Court stated:

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[8](1972), 406 U.S. 715, 92 Sup. Ct. 1845, 32 L.Ed. 2d 435.

[9]*State ex. rel. Matalik v. Schubert* (1973), 57 Wis. 2d 315, 204 N.W. 2d 13; *State ex rel. Haskins v. Dodge County Court* (1974), 62 Wis. 2d 250, 214 N.W. 2d 575.

> ". . . *Baxstrom* held that the State cannot withhold from a few the procedural protections or the substantive requirements for commitment that are available to all others."[10]

The Court also said:

> ". . . The *Baxstrom* principle also has been extended to commitment following an insanity acquittal, *Bolton v. Harris,* 130 U.S. App. D.C. 1, 395 F.2d 642 (1968); *Cameron v. Mullen,* 128 U.S. App. D.C. 235, 387 F.2d 193 (1967); *People v. Lally,* 19 N.Y.2d 27, 224 N.E.2d 87 (1966), and to commitment in lieu of sentence following conviction as a sex offender. *Humphrey v. Cady,* 405 U.S. 504 (1972)."[11]

In its brief here the state discounts this apparent approval of these cases. We believe that the significance of this approval cannot be ignored. The Court was obviously doing more than merely citing these cases for informational purposes. If that was their only significance they could have been placed in a footnote. The conclusion that the United States Supreme Court is approving of the application of the *Baxstrom* "principle" in these cases connot be avoided.

Under the Indiana statutes (in *Jackson v. Indiana)* the state needed only to show that the petitioner was unable to stand trial and the Supreme Court was unable to say that, on the record before them, Indiana could have civilly committed the petitioner as either insane or feebleminded under the

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[10] *Jackson v. Indiana, supra,* footnote 8, at page 727.

[11] *Id.* at pages 724, 725.

standards applied to those groups. The United States Supreme Court found that subjecting the petitioner to a more lenient commitment standard than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing necessary for commitment afforded by the civil statutes of Indiana denied to the petitioner the equal protection of the laws under the Fourteenth amendment.

In *Humphrey v. Cady*,[12] involving Wisconsin litigants, the United States Supreme Court discussed, although did not actually decide, constitutional issues involving the differing procedures afforded persons civilly committed and those committed as "sex deviates" under the statutes of Wisconsin. The petitioner in that case asserted that the original and renewal provisions of the Wisconsin Sex Crimes Act were unconstitutional because such commitments were essentially equivalent to Wisconsin's Mental Health Act which provides for jury determination and his commitment without a jury trial thus deprived him of equal protection.

The United States Supreme Court found that Wisconsin for almost a hundred years has relied on a jury to decide whether to civilly commit a person for compulsory psychiatric treatment:

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[12](1972), 405 U.S. 504, 92 Sup. Ct. 1048, 31 L. Ed. 2d 394.

> "... Wisconsin conditions such confinement not solely on the medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty."[13]

The Supreme Court felt that compulsory treatment under the Sex Crimes Act appeared to require the same kind of determination and raised the question of whether that being so any justification existed for depriving persons committed under the Sex Crimes Act of the jury determination afforded to persons committed under the Wisconsin Mental Health Act. The Court indicated that if commitment under the Sex Crimes Act were not merely an alternative to sentencing there would probably exist no arguable justification for such difference in procedure.

Prior to the *Humphrey* case the Wisconsin Supreme Court had rejected constitutional challenges to the Sex Crimes Act. In *Buchanan v. State*[14] this court rejected a claim that equal protection required a jury trial under the Sex Crimes Act, as was provided under the Mental Health Act. This court found:

> "There are several germane distinctions to the classification, as seen above — the most important is that a sexual deviate is confined because he is dangerous to the public, and the mentally ill, infirm or deficient person is confined primarily for his own benefit and treatment."[15]

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[13] *Id.* at page 509.

[14] (1969), 41 Wis. 2d 460, 164 N.W. 2d 253.

[15] *Id.* at page 472.

However, in *State ex rel. Farrell v. Stovall*[16] the Supreme Court of the United States remanded two matters involving constitutional challenges to the Sex Crimes Act to the Wisconsin court for reconsideration in light of the Supreme Court decisions in *Humphrey v. Cady* and *Jackson v. Indiana*. On remand this court determined that in fact no rational basis existed justifying the difference in the rights afforded to persons committed under the Sex Crimes Act and to those committed under the Mental Health Act. This court found:

> ". . . While the *Buchanan* decision recognized the Acts were distinguishable in terms of their primary emphasis — the confining of the sex deviate chiefly due to the potential danger to the community, and the confining of the mentally ill peson cheifly for his own benefit and treatment, the pervading theme of both Acts is undeniably treatment of the indivudual and protection of the community.
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> ". . . The only meaningful difference between the two Acts, apart from the slightly different emphasis noted in *Buchanan,* is the sex crimes statute's inapplicability except where one's mental illness or 'aberration' has already led him to the commission of a sex crime and conviction therefore."[17]

This court finding the scope and purpose of the statutes virtually identical had to decide whether any rational basis existed for distinctions in the procedure required for commitments under either. The court found that:

> ". . . Such justification, as pointed out by the United States Supreme Court in *Baxstrom v. Herold* and *Humphrey v. Cady,* requires more than an individual's prior criminal record:
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> " '. . . The court [in *Baxstrom*] recognized that the prisoner's criminal record might be a relevant factor in

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[16](1973), 59 Wis. 2d 148, 207 N.W. 2d 809.

[17]*Id.* at page 162.

evaluating his mental condition, and in determining the type of care and treatment appropriate for his condition; it could not, however, justify depriving him of a jury determination on the basic question whether he was mentally ill and an appropriate subject for some kind of compulsory treatment.' "[18]

This court found that commitments under the Sex Crimes Act were not merely sentencing alternatives but independent of the convictions from which they arose and therefore the only meaningful difference between the two Acts was a slightly greater emphasis on public safety under the Sex Crimes Act. This emphasis, however, was not sufficient to justify the differences in procedure under the two Acts.

Because of the cases subsequent to our decision in *State ex rel. Schopf v. Schubert,* we now find that the automatic commitment of persons found not guilty by reason of insanity is a denial to such persons of the equal protection of the laws.

Following a finding of not guilty by reason of mental disease or mental defect, there should now be another question submitted to the jury on whether the defendant is presently suffering from mental illness[19] and is in need of institutionalized treatment. These are the determinations that must be made in connection with a commitment under ch. 51, Stats. To answer such a question, the jury would have to be provided with proof based on examination of the defendant in his then condition. If the answer to this further question is "Yes," then the court shall commit the defendant in accordance with sec. 971.17(1).

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[18] *Id.* at page 164.

[19] Sec. 51.75, Art. II (f), Stats.

Due Process in Proceedings for Commitment.

We also conclude that the procedure under sec. 971.17, Stats., for the automatic commitment of a defendant upon a finding of not guilty by reason of mental disease or mental defect constitutes a denial of due process in its denial of a hearing and finding of present insanity at the time of the commitment.

Jackson v. Indiana does not justify an automatic commitment without a hearing. That case merely holds that the duration of commitment must bear a reasonable relation to the purpose of the commitment. It does not stand for the proposition that commitment can be without a hearing. The petitioner in *Jackson* did have an adjudication of incompetency before being committed.

To satisfy due process, the finding of present mental illness should be made after a full hearing on a defendant's present condition.

Challenge to Reexamination Procedures.

Whereas the provisions of sec. 971.17 (2), Stats., spelling out the procedure for a reexamination of a defendant's mental condition, provide for a general procedure following sec. 51.11, neither sec. 971.17 nor ch. 51 designates who has the burden of proof at a reexamination hearing under ch. 51. Normally, the petitioner carries the burden of persuasion in any judicial proceeding, so that the burden would be on the defendant to persuade the reviewing court that he could be released.[20]

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[20] See 56 Nw. U.L. Rev. 409, 452, note 144 and cases in note 135; *Loeb v. Board of Regents* (1965), 29 Wis. 2d 159, 164, 138 N.W. 2d 227.

There is no denial of equal protection or of due process in placing the burden of showing that a defendant can be released with safety on that defendant, since the burden under sec. 971.17 (2), and under ch. 51.11 is the same. It does not shock the conscience to place this burden on this defendant since ch. 51 provides that the court must appoint two psychiatrists to examine the patient who applies for reexamination and thus the patient is not completely without assistance.

Prospective Ruling.

Because the present petitioner has been committed to the Central State Hospital and has unsuccessfully sought release in several reexaminations, and the same opportunity for reexamination has been available to every criminal defendant committed automatically under sec. 971.17 (1), Stats., following a finding that he was not guilty by reason of mental disease or defect at the time of the alleged offense, we completely prospect this ruling and do not apply it to the petitioner's case. In other words, this ruling governs prosecutions not yet instituted or completed.

Because of our ruling herein, the recommended instruction on the effect of a verdict of "not guilty by reason of mental (*disease*) (*defect*) (*disease or defect*)"[21] must be modified to reflect the fact that on such a finding the jury will be asked as to whether the defendant is presently mentally ill and whether he is a proper subject for custody and treatment.[22]

By the Court. — The provisions of sec. 971.17 (1), Stats., providing for automatic commitment without a hearing

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[21]Wis J I – Criminal, Part I, 655-CPC. *See State v. Shoffner* (1966), 31 Wis. 2d 412, 428, 429, 143 N.W. 2d 458; *Lyles v. United States* (D.C. 1957), 254 Fed. 2d 725; *McDonald v. United States* (D.C. 1962), 312 Fed. 2d 847.

[22]Secs. 51.02 (5) (c) and 971.17 (2), Stats.

to determine present mental state and need for commitment, violate the equal protection and due process clause of the United States Constitution; determination of present mental illness shall be made in all prosecutions either pending or not instituted; other relief denied to this petitioner.

State No. 238

August Term, 1973

STATE OF WISCONSIN: IN SUPREME COURT

State ex rel. MICHAEL
JOHN KOVACH, JR.,
Petitioner,

v.

DR. EDWARD F. SCHUBERT, Supt.,
Central State Hospital,
Respondent.

FILED July 3 1974

ROBERT W. HANSEN, *J. (dissenting).* In this state, by statute, when a defendant in a criminal case is found not guilty by reason of insanity at the time of an offense, he is committed to a state treatment facility until ". . . he may safely be discharged or released without danger to himself or others. . . ."[1]/ The claim here is that this statute violates both equal protection of the law and due process of law. Analysis of such challenge requires initial analysis of the purpose of such insanity acquittal commitment.

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[1]/ Sec. 971.17 (2), Stats.

PURPOSE OF COMMITMENT. What public purpose is served by such commitment of a defendant found not guilty by reason of insanity? The purpose served is twofold: (1) Protection of the public; and (2) treatment and rehabilitation of the defendant.[2]/ More is involved than treating the sick until well.[3]/ Not only is therapy for the defendant involved, but also ". . . proper custodial handling so that the community is protected from individuals who may be dangerous to other persons."[4]/ It is this factor of protecting the public safety that places the ". . . emphasis upon confinement until the public safety justifies release. . . ."[5]/ Realizing the twofold objective of the commitment, this court has made clear the ". . . primary importance of the public safety factor involved in the automatic confinement of a defendant acquitted on the grounds of insanity. . . ."[6]/

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[2]*Treglown v. H&SS department* (1967), 38 Wis. 2d 317, 325, 326, 156 N.W. 2d 363, holding that ". . . the purpose of detention under a statute providing for commitment of a person acquitted of crime by reason of insanity '. . . is not punitive but rather serves a two-fold purpose: (1) to protect the public and the subject, and (2) to afford a place and procedure to treat and, if possible, to rehabilitate the subject.' " (Quoting *Collins v. Cameron* (D.C. 1967), 377 Fed. 2d 945, 947.)

[3]/*Id.* at page 325, this court stating of predecessor statute with likelihood of recurrence rather than the safety of himself and others the test for release: "it is clear that the intent and result of this statutory enactment is not only to authorize but to direct continued confinement under this section beyond the full recovery of the patient until it is established that 'he is not likley to have a recurrence of insanity or mental irresponsibility.' This goes beyond treating the sick until well. It directs confinement until society is reassured that recurrence of insanity or mental irresponsibility will not result in acts which but for insanity or mental irresponsibility would be crimes."

[4]/*State ex rel. Schopf v. Schubert* (1970), 45 Wis. 2d 644, 652, 173 N.W. 2d 673, this court stating: "There is a twofold objective in dealing with prisoners who have been adjudicated not guilty by reason of insanity: (1) Therapy for the mental disease from which they were suffering at the time of the crime, and (2) proper custodial handling so that the community is protected from individuals who may be dangerous to other persons."

[5]/*Treglown v. H&SS department, supra,* footnote 2, at page 327.

[6]/*Id.* at page 326.

STATUS OF DEFENDANT. When a defendant on a criminal charge has been found not guilty by reason of insanity what has happened? Our court has said that: "When a mentally ill person engages in offensive conduct made punishable by law, society is faced with the question whether at the time of engaging in the offensive conduct the accused was dominated or affected by the mental illness to so substantial a degree that society cannot, in good conscience, hold him responsible for the conduct as a crime, *i.e.*, punish him. . . ."[7]/ The answer to that question, we have held, is that ". . . [t]he legislature and the judiciary, by making general rules, and the jury by its verdict in a specific case must, in combination, provide the answer. . . ."[8]/ That answer, measuring the degree of relationship between the mental illness of the defendant and his offensive conduct, is a legal and not a medical concept.[9]/ In the case before us. the petitioner asserted such legal defense of insanity and was found not guilty by reason of such insanity. He thus became a member of what has been termed "an exceptional class of people — people who have committed acts forbidden by law, who have obtained verdicts of 'not guilty by reason of insanity.' "[10]/ It is a class or category that is

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[7]/*State v. Esser* (1962), 16 Wis. 2d 567, 585, 115 N.W. 2d 505.

[8]/*Id. at page 585.*

[9] *Id.* at page 586, this court stating: "Almost universally, however, the courts provide a standard by which the jury is instructed to measure whether the degree of relationship between the mental illness of the accused and his offensive conduct is sufficient to relieve him from responsibility. We refer to this standard as the definition of the defense of insanity. It is not a definition of mental illness or medical insanity, but a definition of the defense, a legal and not a medical concept."

[10]/*Overholser v. Leach* (D.C. Cir. 1958), 257 Fed. 2d 667, 669, certiorari denied (1959), 359 U.S. 1013, 79 Sup. Ct. 1152, 3 L.Ed. 2d 1038, stating of insanity acquittal commitment statute: "/This statute applies to an exceptional class of people—people who have committed acts forbidden by law, who have obtained verdicts of 'not guilty by reason of insanity,' and who have been committed to a mental institution pursuant to the Code. People in that category are treated by Congress in a different fashion from persons who have somewhat similar mental conditions, but who

distinct and different from persons committable in civil commitment proceedings for purpose of treatment only.[11] It is a class or category also distinct and different from those who are found incompetent to stand trial in judicial proceedings,[12] or those, nearing the end of a prison term, for whom civil commitment is sought solely for the purpose of treatment until recovery.[13]

PROVISIONS FOR RELEASE. It is the ". . . public safety requirements for his release. . ."[14] along with the ". . . nontreatment factors involved in his commitment . . ."[15] that sharply distinguish the purpose of an insanity

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have not committed offenses or obtained verdicts of not guilty by reason of insanity. . . ." (Quoted in *Ragsdale v. Overholser* (D.C. Cir. 1960), 281 Fed. 2d 943, 946.)

[11] *Id.* at page 669, the court stating: "The test of this [insanity acquittal commitment] statute . . . is not whether a particular individual, engaged in the ordinary pursuits of life, is committable to a mental institution under the law governing civil commitments. Cf. Overholser v. Williams, 1958, 102 U.S. App. D.C. 248, 252 F. 2d 629. Those laws do not apply here. . . ."

[12] *See: Jackson v. Indiana* (1972), 406 U.S. 715, 738, 92 Sup. Ct. 1845, 32 L.Ed. 2d 435, involving indeterminate commitment of feebleminded deaf mute as incompetent to stand trial, the court stating: "We hold, consequently, that a person charged by a State with a criminal offense who is committed *solely* on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. . . ." [Emphasis supplied.]

[13] *See: Baxtrom v. Herold* (1966), 383 U.S. 107, 86 Sup. Ct. 706, 15 L.Ed. 2d 620, where a prisoner nearing the end of his prison term was civilly committed by a procedure radically different from that used to civilly commit others. *See also: State ex rel. Schopf v. Schubert, supra,* footnote 4, the court stating at page 650: ". . . The only reason for this was that he was a prisoner about to complete his sentence" and concluding "The denial of equal protection arose as a result of providing two different methods of *civil* commitment and *with no reasonable basis for it.*" [Emphasis supplied.]

[14] *Treglown v. H&SS Department, supra,* footnote 2, at page 327.

[15] *Id.* at page 327.

acquittal commitment from a civil commitment. The statute governing civil commitment proceedings provides that ". . . the person is committed to a hospital for treatment until recovered . . ."[16]/ and that ". . .[r]ecovery from mental illness is the sole rest for release. . . ."[17]/ In fact, under certain circumstances, a person civilly committed may be released before he is fully recovered from his mental illness.[18]/ It is the differing statutory provisions concerning release or discharge that help establish the nature and purpose of the commitments involved, and the reasonable basis for distinguishing between them. As we stated in *Treglown,* it is ". . .[t]his emphasis upon release [in civil commitment proceedings] as soon as recovery or the welfare of the patient permits [that] establishes the nature and purpose of the confinement: treatment for the illness involved."[19]/ Not so with the petitioner here, for, as in *Treglown,* ". . . He was found not guilty by reason of insanity and was comitted to the Central State Hospital *for the protection of the public* and for his rehabilitation and treatment, if possible."[20]/ [Emphasis supplied.]

EQUAL PROTECTION OF LAW. The petitioner's contention is that only by some equivalent of civil commitment proceedings could he constitutionally be committed to a

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[16]/*Id.* at page 323.

[17]/*Id.* at page 323.

[18]/*Id.* at page 324, summarizing applicable statutes for discharge in civil commitments, stating: ". . . Sec. 51.11 (5), provides that the court may order discharge of a patient if it determines that he is no longer 'in need of care and treatment.' Under sec. 51.12 (4), the superintendent of any state or county hospital or mental health center, with the approval of the Department of Health and Social Services necessary outside of Milwaukee county, may discharge any patient who in his judgment is recovered or who is not recovered but whose discharge will not be detrimental to the public welfare or injurious to the patient. Under sec. 51.13 (1) and (2), the superintendents of certain state mental institutions may grant conditional releases to patients if, in their opinion, 'it is proper to do so,' or upon the written recommendation of the visiting physician. . . ."

[19]/*Id.* at page 324.

state treatment facility following his insanity acquittal. It is without merit. The equal protection clause disapproves only irrational and arbitrary classifications.[21]/ Equal protection of the law ". . . does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. . . ."[22]/ The difference in procedures for civil commitment and the insanity acquittal commitment are warranted by the obvious differences in the primary purpose of the commitments involved. Exactly as this court concluded in the *Schopf Case* on the precise point involved, the writer would conclude that: ". . . The classification made by the legislature in the instant situation between civil commitment and criminal commitment is neither irrational nor arbitrary, and, in fact, is perfectly reasonable. . . ."[23]/ As was appropriately said in *Schopf*, ". . . Concern for the general safety of the community requires at least this much. . . ."[24]/

Counsel for petitioner disagrees, apparently viewing the United States Supreme Court decision in the *Jackson Case*[25]/ as washing away the foundation of our court's holding in *Schopf* on the equal protection issue. Neither the facts nor the holding in *Jackson* warrant any such conclusion. In *Jackson*, the high court dealt with incompetency to stand trial. The petitioner there was a mentally defective deaf mute,[26]/ committed to a mental hospital ". . . solely on

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[21]/*See: McGowan v. Maryland* (1961), 366 U.S. 420, 81 Sup. Ct. 1101. 6 L.Ed. 2d 393.

[22]/*Baxstrom v. Herold, supra*, footnote 13, at page 111. (Quoted in *State ex rel. Farrell v. Stovall* (1973), 59 Wis. 2d 148, 171, 207 N.W. 2d 809.)

[23]/*State ex rel. Schopf v. Schubert, supra*, footnote 4, at page 651.

[24]/*Id.* at page 652.

[25]/*Jackson v. Indiana, supra*, footnote 12.

[26]/*Id.* at page 717, the court stating: "Petitioner, Theon Jackson, is a mentally defective deaf mute with a mental level of a pre-school child. He cannot read, write, or otherwise communicate except through limited sign language. . . ." *Id.* at page 719, the court stating: ". . . [T]he trial court found that Jackson 'lack[ed] comprehension sufficient to make his defense, . . . and ordered him committed to the Indiana Department of Mental Health until such time as that Department should certify to the court that 'the defendant is sane.'"

account of his incapacity to proceed to trial. . . ."[27]/ He was there confined for three and one-half years, and medical testimony was that he never would be able to proceed to trial.[28]/ Under these circumstances,[29]/ the high court held that the mere filing of criminal charges, no more, did not warrant confining the petitioner for ". . . more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity [to proceed to trial] in the foreseeable future. . . ."[30]/ The commitment statute there involved required a showing of dangerousness, and the court held that ". . . the pending criminal charges are insufficient to establish it, and no other supporting evidence was introduced. . . ."[31]/ *Jackson* is to be distinguished from *Schopf* and the case before us by the purpose of the commitments involved and the status of the petitioners involved, as well as by the absence in the *Jackson* situation of the public safety factor.

In *Jackson*, the opinion cites the *Baxstrom* holding that ". . . a state prisoner civilly committed at the end of his prison sentence . . . was denied equal protection when he was deprived of a jury trial that the State made generally available to all other persons civilly committed. . . ."[32]/ In *Baxstrom*,

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[27]/ *Id.* at page 738.

[28]/ *Id.* at page 718, 719, the court stating: ". . . One doctor testified that it was extremely unlikely that petitioner could ever learn to read or write and questioned whether petitioner even had the ability to develop any proficiency in sign language. . . . The other doctor testified that even if Jackson were not a deaf mute, he would be incompetent to stand trial, and doubted whether petitioner had sufficient intelligence ever to develop the necessary communication skills. . . ."

[29]/ *Id.* at pages 725, 726, the court stating: "Were the State's factual premise that Jackson's commitment is only temporary a valid one, this might well be a different case. But the record does not support that premise. . . . There is nothing in the record that even points to any possibility that Jackson's present condition can be remedied at any future time."

[30]/ *Id.* at page 738.

[31]/ *Id.* at page 728.

[32]/ *Id.* at pages 723, 724.

the court said that ". . . there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments."[33]/ Then, in *Jackson*, the court commented that: ". . . The *Baxstrom* principle also has been extended to commitment following an insanity acquittal. . . ."[34]/ This brief observation of lower court extensions of the *Baxstrom* holding is not to be ballooned into a high court mandate against automatic commitment in insanity acquittal situations. Such informational comment does not delineate in any manner the nature or extent of the extension made by lower courts nor does it mandate that their example be followed.

Reluctance to escalate a mention into a proscription is strengthened by reference to the three cases cited. In one, the *Bolton Case*,[35]/ an earlier case, *Ragsdale v. Overholser*[36]/ justifying immediate commitment in insanity acquittal cases to protect the public, is considered overruled.[37]/ In a second case cited, the *Lally Case*,[38]/ the same *Ragsdale v. Overholser* decision is cited, followed and its reasoning termed "sound."[39]/ In the third case, the *Cameron Case*,[40]/ the proposition that one acquitted by reason of

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[33]/*Id.* at page 724, citing and quoting *Baxstrom v. Herold, supra*, footnote 13.

[34]/*Id.* at page 724, citing *Bolton v. Harris* (D.C. Cir. 1968), 395 Fed. 2d 642; *Cameron v. Mullen* (D.C. Cir. 1967), 387 Fed. 2d 193; *People v. Lally* (1966), 19 N.Y. 2d 27, 224 N.E. 2d 87.

[35]/*Bolton v. Harris, supra*, footnote 34.

[36]/*Ragsdale v. Overholser, supra*, footnote 10.

[37]/*Bolton v. Harris, supra*, footnote 34, at page 649.

[38]/*People v. Lally, supra*, footnote 34.

[39]/*Id.* at page 33.

[40]/*Cameron v. Mullen, supra*, footnote 34.

insanity ". . . presumably constitutes a greater danger to the public than those civilly committed . . ."[41]/ is stated to be the basis for congressional adoption of the statute involved, and cases are cited in which such justification ". . . has found expression . . ."[42]/ with *Ragsdale v. Overholser* included. *Ragsdale v. Overholser* holds those who have obtained verdicts of not guilty by reason of insanity to be "an exceptional class of people" treated differently from persons who have not committed offenses or obtained verdicts of not guilty by reason of insanity.[43]/

DUE PROCESS OF LAW. The ". . . nontreatment factors involved in his commitment. . ."[44]/ and the ". . . public safety requirements for his release. . ."[45]/ are relevant to petitioner's claim that commitment following insanity acquittal denied due process. They are a reminder that the petitioner was found not guilty of the commission of a criminal offense solely on his asserted defense of being insane at the time of commission of the offense.[46]/ It is such nontreatment factors and such public safety requirements for release that establish the basis and need for what in *Schopf* was

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[41]/*Id.* at page 200. *See also:* Page 201, footnote 26, stating: "See, e.g., Sen. Rep. No. 1170, H.R. Rep. No. 892, 84th Cong., 1st Sess. (1955), at p. 13: 'The Committee is of the opinion that the public is entitled to know that, in every case where a person has committed a crime as a result of a mental disease or defect, such person *shall* be given a period of hospitalization and treatment to guard against imminent recurrence of some criminal act by that person.' (Emphasis in original.)"

[42]/*Id.* at page 200. *See also:* Page 201, footnote 26, continuing: "See Overholser v. Leach, 103 U.S. App. D.C. 289, 291, 257 F. 2d 667, 669 (1958), cert. denied, 359 U.S. 1013, 79 S. Ct. 1152, 3 L.Ed. 2d 1038 (1959); *Ragsdale* v. Overholser, 108 U.S. App. D.C. 308, 281 F. 2d 943 (1960); Overholser v. O'Beirne, 112 U.S. App. D.C. 267, 302 F. 2d 852 (1961). See also Lynch v. Overholser, 369 U.S. 705, 715-716, 82 S. Ct. 1063 (1962); . . ."

[43]/*Ragsdale v. Overholser, supra,* footnote 10, at page 946 (Quoting *Overholser v. Leach, supra,* footnote 10.)

[44] *Treglown v. H&SS Department, supra,* footnote 2, at page 327.

[45]/*Id.* at page 327.

[46] *See. State v. Esser, supra,* footnote 7, on legal defense of insanity.

termed ". . . proper custodial handling so that the community is protected from individuals who may be dangerous to other persons."[47]/ In the *Lally Case*,[48]/ heretofore discussed, the emphasis upon the need to protect the public is evident in the court's refusing to declare unconstitutional a New York State statute providing for automatic commitment following an insanity acquittal verdict. In refusing to strike down the statute, the court said: ". . . We see no reason why a man who has himself asserted that he was insane at the time the crime was committed and has convinced the jury thereof should not in his own interest *and for the protection of the public* be forthwith committed for detention, examination and report as to his sanity."[49]/ [Emphasis supplied.]

In *Lally*, in upholding the constitutionality of the statute providing for automatic commitment of defendants found not guilty by reason of insanity,[50]/ the court placed emphasis upon the opportunity provided the persons committed to ". . . challenge the validity of his continued detention. . . "[51]/ It noted that, under its insanity acquittal law, as under ours, the person committed ". . . may make, to the court by which he was committed, an application for his release or discharge. . . ."[52]/ It noted that, under their statute, as is the case

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[47]/*State ex rel. Schopf v. Schubert, supra*, footnote 4, at page 652.

[48]/*People v. Lally, supra*, footnote 34.

[49]/*Id.* at page 33.

[50]/*Id.* at page 30, the court noting that the statute involved provided that: ". . . when in a criminal case the defense pleads insanity and the jury acquits on that ground the court must order the defendant to be committed to the custody of the State Commissioner of Mental Hygiene to be placed in an appropriate institution in the Mental Hygiene or Correction Department approved by the head of such department. . . ."

[51]/*Id.* at page 33.

[52]/*Id.* at pages 30, 31.

under ours, the person committed can at any time ". . . ask for a hearing as to his present condition. . . ."[53]/ It noted that the petitioner before it did not ask for such a hearing, just as the petitioner in the case before us has not, but instead ". . . stood on his contention that his original and continued detention was illegal because of the alleged unconstitutionally of the statute."[54]/ In *Lally*, the state appellate court did read into the statutory provisions for such applications and hearings ". . . a provision for a jury trial of these issues, if appellant so requests. . . ."[55]/ The petitioner in the case before us already has such right to jury trial on application for reexamination.[56]/ (In fact, he already has had three such reexamination hearings.) In rejecting the due process challenge to the Wisconsin law, we give weight to the right to petition for reexamination of status and mental condition that is afforded to persons committed following insanity acquittals.

The person committed following an insanity acquittal verdict may petition the court for reexamination of his mental condition and a determination of whether he may safely be released without danger to himself or others at any time after such commitment. As was said in *Schopf*, ". . . the prisoner adjudicated not guilty by reason of insanity can initiate proceedings to be reexamined and perhaps released the moment he arrives at the Central State Hospital. . . ."[57]/ The person found not guilty by reason of insanity and consequently

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[53]/*Id.* at page 33.

[54]/*Id.* at page 34.

[55]/*Id.* at page 35.

[56]/*See:* Sec. 971.17 (2), Stats., incorporating the provisions of sec. 51.11(5), Stats., providing in part: ". . . If a jury trial is demanded, the procedure shall, as near as may be, be the same as in s. 51.03, and the court's order or determination shall be in accordance with the jury's verdict."

[57]/*State ex rel. Schopf v. Schubert, supra*, footnote 4, at page 654.

committed is ". . . sent to Central State Hospital, but with the right to petition for an examination the minute he arrives. . . ."[58]/ As *Schopf* puts it, ". . . When he petitions for the examination, he gets it."[59]/ This aspect of the Wisconsin insanity acquittal commitment law provides adequate process to the petitioner here, and others in his same category. So, exactly as *Schopf* concluded in precisely the same situation, the writer would hold the procedures legislatively provided in this state to be ". . . constitutionally adequate to satisfy the requirements of due process. . . ."[60]/

FINDING OF DANGEROUSNESS. This dissenting opinion has stressed what this court has termed ". . . [t]he primary importance of the public safety factor involved in the automatic commitment of a defendant acquitted on the grounds of insanity. . . ."[61]/ The importance of this public protection factor is also emphasized in the reference in *Jackson v. Indiana* to a federal statute, 18 U.S.C. 4247, applicable on its face to convicted criminals whose federal sentences are about to expire and by judicial interpretation to defendants incompetent to stand trial. This statute ". . . permits commitment if the prisoner is (1) 'insane or mentally incompetent' and (2) ' will probably endanger the safety of the officers, the property, or other interests of the United States. . . .' "[62]/ The *Jackson* decision notes that a person committed under

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[58]/*Id.* at page 654.

[59]/*Id.* at page 655.

[60]/*Id.* at page 653.

[61]/*Treglown v. H&SS Department, supra,* footnote 2, at page 326.

[62]/*Jackson v. Indiana, supra,* footnote 12, at pages 731, 732.

this section ". . . must be released when he no longer is 'dangerous.' " [63]/ It notes that, in *Greenwood*,[64]/ it had upheld even a pretrial commitment under this statute of a defendant who had met all three conditions, but had done so only because ". . . the District Court had in fact . . . found specifically that Greenwood would be dangerous if not committed . . ."[65]/ and, accordingly, ". . . Greenwood was entitled to release when no longer dangerous. . . ."[66]/ While the high court is discussing here a commitment of a defendant found incompetent to stand trial, it clearly states that the *Greenwood* commitment was sustained ". . . only upon the finding of dangerousness...."[67]/

In the case of an insanity acquittal commitment, the writer would hold the element of dangerousness to others to be supplied by the fact of an acquittal solely on the basis of insanity, with the public entitled by that fact alone to commitment with the right of immediate reexamination assured the person committed and confinement and treatment mandated until the person committed ". . . may safely be discharged or released without danger to himself or others. . . ."[68]/ However, the writer sees the statute strengthened against future challenge by the majority's requiring that the same jury which finds a defendant not guilty by reason of insanity at the time of the offense also answers whether or not the

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[63]/*Id.* at page 732, the court noting that: "One committed under this section, however, is entitled to release when any of the three conditions no longer obtains, 'whichever event shall first occur.' . . ."

[64]/*Greenwood v. United States* (1956), 350 U.S. 366, 373, 374, 76 Sup. Ct. 410, 100 L.Ed. 412.

[65]/*Jackson v. Indiana, supra*, footnote 12, at page 732.

[66]/*Id.* at page 732.

[67]/*Id.* at page 736.

[68]/Sec. 971.17 (2), Stats.

defendant, at the time of the verdict, is insane or dangerous to himself or others. If the jury that found the defendant insane at the time of omission of the offense were to find such defendant sane and no danger to himself or others at the time of verdict, the dual basis for and purpose to be served by commitment to a treatment facility would be specifically negatived. If the jury found that such insanity-acquitted defendant was either presently insane or dangerous to himself or others, not much would be added except the buttressing of the statute against a possible constitutional challenge based on some expansion and extension of what was said in the *Greenwood Case*. However, certainty is the goal of the judicial process, and particularly so in the criminal field. So the writer accepts as a proper and prudent procedural requirement under the insanity acquittal statute the majority requirement that the jury, if it finds the defendant not guilty by reason of insanity, also be required to answer whether or not it finds that such defendant, at the time of the verdict, is either insane or presents a danger to himself or others.

This long enough journey ends with the writer concluding: (1) The Wisconsin insanity commitment law does not deny either equal protection or due process of law; and (2) the added requirement that, where a jury finds a defendant not guilty by reason of insanity, it also determine whether such defendant is insane or dangerous to himself or others at the time of the verdict is a proper and prudent procedural requirement.

I am authorized to state that Mr. Justice Leo B. Hanley and Mr. Justice Connor T. Hansen concur in the portion of this opinion that upholds the constitutionality of the insanity acquittal commitment statute, sec. 971.17 (1), Stats.

SUPREME COURT, U. S.

FILED

OCT 15 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-353

DR. EDWARD F. SCHUBERT, Superintendent,
Central State Hospital, Waupun, Wisconsin,
Petitioner-Appellee,

vs.

MICHAEL JOHN KOVACH, JR.,
Respondent-Appellant.

ON PETITION FOR WRIT OF CERTIORARI TO AND APPEAL FROM THE WISCONSIN SUPREME COURT

JURISDICTIONAL STATEMENT AND RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Wisconsin Supreme Court entered July 3, 1974, appears at 64 Wis. 2d 612 and 219 N.W. 2d 341 *sub nom. State ex rel. Kovach v. Schubert*. The complete opinion is set forth in the Petition (App. 101-126).

JURISDICTION

The petitioner-appellee invokes this court's certiorari jurisdiction pursuant to 28 U.S.C. sec. 1257 (3).

The respondent-appellant appeals pursuant to 28 U.S.C. 1257 (2) inasmuch as the Wisconsin Supreme Court upheld the validity of sec. 971.17 (2) of the Wisconsin statutes which relate to the reexamination and rehearing provisions for a person found not guilty by reason of mental disease or defect. Such statutes were attacked as violating the Due Process and Equal Protection provisions of the Fourteenth Amendment to the United States Constitution.

The Petition and Notice of Appeal were both filed within 90 days of the mandate of the Wisconsin Supreme Court which was issued on July 3, 1974. On October 1, 1974, Mr. Justice Rehnquist granted appellant's application for a 30 day extension in which to docket this appeal, to October 31, 1974.

QUESTIONS PRESENTED

[By Petition for Certiorari]

1. Do the provisions of sec. 971.17 (1), Wis. Stats., providing for the automatic commitment of criminal defendants found not guilty by reason of mental disease or defect without a hearing to determine present mental state and need for commitment, violate the Equal Protection and Due Process Clauses of the United States Constitution?

[By Appeal]

2. Do the provisions of sec. 971.17 (2), Wis. Stats. which place a high burden upon a person found not guilty by reason of mental disease or defect who desires to be

released from commitment, and which are higher than the standard required of persons civilly committed, violate the Equal Protection or Due Process Clauses of the Fourteenth Amendment to the United States Constitution?

3. Was the ruling of the Wisconsin Supreme Court declaring the statutes pursuant to which the respondent-appellant was committed unconstitutional, but denying relief to the respondent-appellant, appropriate in view of the statutory procedure?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article XIV of Amendments:

"Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Wisconsin Statutes

Section 971.17:

"**Legal effect of finding of not guilty because of mental disease or defect.** (1) When a defendant is found not guilty by reason of mental disease or defect, the court shall order him to be committed to the department to be placed in an appropriate institution for custody, care and treatment until discharged as provided in this section.

"(2) A reexamination of a defendant's mental condition may be had as provided in s. 51.11, except that the reexamination shall be before the committing court and notice

shall be given to the district attorney. The application may be made by the defendant or the department. The burden shall be on the defendant to prove that he may safely be discharged or released without danger to himself or others. If the court is so satisfied, it shall order the discharge of the defendant or his release on such conditions as the court determines to be necessary. If it is not so satisfied, it shall recommit him to the custody of the department.

"* * *"

STATEMENT

The Statement in the Petition for Certiorari is basically correct. The Wisconsin Supreme Court declared unconstitutional the provisions of sec. 971.17 (1), Wis. Stats., which provide for the automatic commitment of a person found not guilty by reason of mental disease or defect at the time of the criminal act without a finding of present mental illness. The court upheld the constitutional validity of the provisions of sec. 971.17 (2), which concern the hearing to determine whether a person who has been committed under sec. 971.17 (1), is no longer dangerous and thus can be released. The court finally denied all relief to respondent-appellant, holding that its decision was prospective only.

ARGUMENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. The Petitioner Lacks Standing To Seek Review Of The Order Denying The Petition For A Writ Of Habeas Corpus.

This action is one seeking the respondent's release through a writ of habeas corpus. The Wisconsin Supreme

Court denied the writ. While it is true that within the opinion of the court denying respondent relief it is stated that a section of the Wisconsin statutes is unconstitutional, it is equally clear that such a declaration was unnecessary to supporting the order denying the writ. In such circumstances the petitioner, who prevailed *below, cannot seek review in this Court.* As was stated by this Court in *Electrical Fittings Corporation v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939):

> "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree."

In accord: Lindheimer v. Illinois Bell Tel. Co., 292 U.S. 151, 176 (1934); *Partmar Corp. v. Paramount Pictures Th. Corp.*, 347 U.S. 89,99 (1954).

It is apparent that the decision of the Wisconsin Supreme Court denying the petition for habeas corpus did not require a decision on the question of the constitutionality of the commitment procedures codified under sec. 971.17 (1), Wis. Stats. All the decision required was to decide that because the respondent had several times sought reexamination, he was not prejudiced by the lack of constitutionality of the commitment procedures. While respondent believes that to be an erroneous determination, the fact remains that the part of the decision which the petitioner desires reviewed is mere *dicta,* having no effect upon the underlying action. He thus lacks standing to seek review in this Court of the order denying the petition for habeas corpus.

II. The Decision Of The Wisconsin Supreme Court Declaring The Automatic Commitment Procedures Unconstitutional Is Manifestly Correct And Consistent With The Decisions Of This Court.

A. The statutory scheme.

While we agree with petitioner that the issues presented in this case are substantial and has application to a number of jurisdictions, it is apparent that the decision of the Wisconsin Supreme Court was correct and consistent with the line of cases decided by this Court following *Baxstrom v. Herold*, 383 U.S. 107 (1966).

It must be emphasized that unlike most other jurisdictions the Wisconsin statutory procedures codified under sec. 971.17 (1), Stats., provide for mandatory indefinite commitment for a period not to exceed the maximum penalty for the offense charged. No decision was made that the defendant was mentally ill or dangerous at the time he was committed — he was committed regardless of his mental state. This was not a temporary evaluation to determine the defendant's condition — it was a permanent commitment to a hospital for the criminally insane.

B. The Wisconsin decisions are consistent with more recent decisions of other courts.

While petitioner suggests that there is a split of opinion among jurisdictions as to the constitutionality of the automatic commitment procedures, it is apparent that any question

of constitutionality has been put to rest by *Jackson v. Indiana*, 406 U.S. 715 (1972). In *Jackson*, this Court specifically adopted the reasoning now attacked by the petitioner, at 406 U.S. 727 (App. 106). In fact, the decision in *Jackson* was the basis for the Wisconsin court reversing its decision as to the constitutionality of these procedures from its decision in *State ex rel. Schopf v. Schubert*, 45 Wis. 2d 644, 173 N.W.2d 673 (1970), in which these same procedures were upheld when attacked as unconstitutional.

It must be noted that *all* of the cases relied upon by the petitioner were decided before *Jackson* and that both the Wisconsin court in this case and the Arizona Supreme Court in *State v. Clemons*, 110 Ariz. 79, 515 P.2d 324 (1974) squarely held that *Jackson* requires the result that such statutes are unconstitutional. Thus any split of authority is vitiated by the clear statement in *Jackson* supporting the decision in this case.

C. The decision in this case is entirely consistent with the "Baxstrom Principle."

The constitutional principle applied by the Wisconsin Supreme Court in this case has its genesis in this Court's decision in *Baxstrom v. Herold*, 383 U.S. 107 (1966). Mr. Justice Blackmun summarized the "*Baxstrom* Principle" in this Court's decision in *Jackson v. Indiana*, 406 U.S. 715, 724:

> "Rejecting the State's argument that Baxstrom's conviction and sentence constituted adequate justification for the difference in procedures, the Court said that 'there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.' 383 U.S. at 111-112 (additional citations omitted). The Court also

> held that Baxstrom was denied equal protection by commitment to an institution maintained by the state corrections department for 'dangerously mentally ill' persons without a judicial determination of his 'dangerous propensities' afforded all others so committed."

In a line of cases which includes *Baxstrom* and *Jackson* as well as such cases as *Specht v. Patterson*, 386 U.S. 605 (1967), and *Humphrey v. Cady*, 405 U.S. 504 (1972), the Court has made pellucid the fact that a difference in procedure cannot be justified by the defendant's criminal record or by the fact that his commitment is the result of proceedings in criminal, as opposed to civil, court.

The decision of the Wisconsin Supreme Court as written by Chief Justice Wilkie is entirely consistent with this line of cases which has proceeded directly from *Baxstrom* through *Jackson*. Any other result would be an obvious deviation from the teachings of this Court over the past decade. While petitioner asserts that the difference in procedure is justified, when that argument is analyzed, the *only* purported rationale for the difference in procedure is that the defendant has gone through the criminal process and has not been civilly committed. That is a rationale repeatedly rejected by this Court as a valid factor upon which to base a difference in procedure. Those state court opinions relied upon by the petitioner advance the same erroneous reasoning that petitioner asserts, and, again, all such opinions were decided prior to this Court's latest and most definitive decision in *Jackson* which not only retained the *"Baxstrom* Principle," but substantially expanded its application.

The decision of the Wisconsin court in this regard was entirely consistent with the law enunciated by this Court and any other result would require the abrogation of the *"Baxstrom* Principle" despite this Court's adherence thereto in every appropriate case since 1966.

D. The Wisconsin Supreme Court correctly held that the automatic commitment procedures violate due process of law.

It is also apparent that the Wisconsin court's determination that the automatic commitment procedures violate the Due Process Clause of the Fourteenth Amendment was clearly correct. In *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971), this Court indicated that in order to comply with the Due Process Clause "a meaningful opportunity to be heard" must be provided. It is obvious that since the respondent was given no opportunity to be heard on the issue of whether he was "insane" at the time of his commitment or that he required such commitment, such a commitment violates even the strict rule of *Boddie*. There was no meaningful opportunity to be heard in this case, and sec. 971.17, Stats., contemplates no such hearing.

The due process analysis of this Court in *Jackson* is also on point and supportive of respondent's position. In holding that Jackson's automatic commitment as incompetent to stand trial was a violation of due process, the Court, at 406 U.S. 734-735, assailed such automatic commitments which place a criminal defendant in a mental institution without a finding that he was mentally ill or dangerous at the time — that is exactly what the Wisconsin statutes require. Again, as will be demonstrated below, the rehearing provisions certainly do not save the validity of the statutes. After discussing the various cases on the due process question, the Court concludes, at 406 U.S. 738, that the commitment of Jackson was invalid because there had been "no formal commitment proceedings" to determine his present status. Thus in *Jackson* the Court really gets us back to the *Boddie* test — a reasonable — a fair — opportunity to be heard and to require the state to show that Jackson there, or Kovach here, must be committed.

In *Morrissey v. Brewer,* 408 U.S. 471 (1972), this Court considered the question of when due process applied:

> "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), quoted in Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970)," at 408 U.S. 481.

It is evident that the loss of liberty under sec. 971.17, Stats., and the resulting confinement in a maximum security hospital is such a "grievous loss" under any reasonable test.

This Court continues in *Morrisey* to point out that once it has been determined that due process does apply, the court must then turn its attention to the precise nature of the proceedings the constitution requires. There is, however, a basic point from which all due process must proceed. That point was identified in *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970):

> " 'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)."

Here there was no hearing at all, thus we need not determine exactly what type of hearing should have been afforded — although that might be a good idea. The lack of any hearing manifestly violates the Due Process Clause. The hearing must also be at the "meaningful time," i.e., the time of commitment.

It is thus submitted that the decision of the Wisconsin court in relation to due process was also correct and consistent with this Court's decisions.

JURISDICTIONAL STATEMENT

I. The Rehearing Provisions Codified As Sec. 971.17 (2), Wis. Stats., Violate The Due Process And Equal Protection Provisions Of The Fourteenth Amendments.

A. The issue.

The Wisconsin Supreme Court upheld the constitutionality of the provisions of sec. 971.17 (2), Wis. Stats., which relate to the procedure for seeking the reexamination of a person found not guilty by reason of mental disease or defect. Under the provisions of this statute a person so committed must sustain the burden of proving that "he may safely be discharged or released without danger to himself or others." At an initial civil hearing the state must prove beyond a reasonable doubt that the person is both ill and dangerous, *Lessard v. Schmidt,* 349 F.Supp. 1078, 1095 (E.D. Wisc., 1972). Upon rehearing in a civil case all the court must determine is that the "patient" is no longer in need of care and treatment, sec. 51.11 (5), Wis. Stats. It is thus manifestly apparent that the rehearing provided by sec. 971.17 (2) is nothing like an initial civil commitment hearing or a hearing afforded civilly committed persons upon petition for reexamination.

B. The issue is substantial and common to many jurisdictions.

The petitioner-appellee has argued that the issues involved in this case are important and has import to a number of jurisdictions. Of this there can be no doubt. It is just as apparent, however, that the rehearing provisions are equally

important and the issues raised by the Court's decision in this regard effect many jurisdictions.

In some respects the rehearing provisions of the statute is even more important because it has received less judicial scrutiny. As will be noted below, *Jackson v. Indiana* represents this Court's only prior opportunity to consider the ramifications of statutory schemes which make it easier for one class of persons to be committed, while at the same time making it more difficult for that same class to be released.

C. The decision of the Wisconsin court is contrary to the decisions of this Court.

1. The Court should have applied the "*Baxstrom* Principle" to the rehearing as well as the commitment procedures.

It is clear from this Court's decision in *Jackson* that the Wisconsin Supreme Court should have considered the equal protection question of the rehearing provisions in light of *Baxstrom*. In *Jackson*, the Court pointed out, at 406 U.S. 729-730:

> "*Baxstrom* did not deal with the standard for release, but its rationale is applicable here. The harm to the individual is just as great if the State, without reasonable justification, can apply standards making his commitment a permanent one when standards generally applicable to all others afford him a substantial opportunity for early release.
>
> ". . ., we hold that by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization

> without the showing required for commitment or the opportunity for release afforded by § 22-1209 or §22-1907, Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment." (Footnote omitted.)

In rejecting this argument, the Wisconsin Supreme Court found only that this difference in procedure did not "shock the conscious" of the court, at 64 Wis. 2d 624 (App. 112). This extraordinary equal protection test, which finds support in neither the decisions of this Court nor earlier decisions of the Wisconsin Supreme Court, demonstrates the erroneous reasoning applied by the Wisconsin court. While there can be a question as to the test to be applied — the "rational relationship or compelling state interest" test — in these equal protection cases, nothing supports a "shock the conscious" equal protection evaluation. In fact, this test is rejected by the court in this same opinion in which it applied a different test to strike down the commitment procedures. We submit that the decision in relation to the rehearing procedures is erroneous and contrary to the decisions of this Court.

2. The shift in burden of proof is a denial of Due Process.

Appellant further contends that the statutory provisions which shifts the burden of proof from the state to the defendant are unconstitutional as a violation of due process of law because of the shift in burden. The constitutional bar to shifting the burden of proof in a criminal or civil case was discussed in detail by this Court in *Speiser v. Randall*, 357 U.S. 513, 523-524 (1958):

> " '[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' McFarland v. American Sugar Refining Co., 241 U.S. 79, 86, 36 S.Ct. 498, 501, 60 L.Ed. 899. The

> legislature cannot 'place upon all defendants in criminal cases the burden of going forward with the evidence * * *. [It cannot] validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.' Tot v. United States, 319 U.S. 463, 469, 63 S.Ct. 1241, 1246, 87 L.Ed. 1519. Of course, the burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant, but only after the State has 'proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.' Morrison v. People of State of California, 291 U.S. 82, 88-89, 54 S.Ct. 281, 284, 78 L.Ed. 664. In civil cases too this Court has struck down state statutes unfairly shifting the burden of proof. Western & A.R. Co. v. Henderson, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884; cf. Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 43, 31 S.Ct. 136, 138, 55 L.Ed. 78."

Under the provisions of sec. 971.17, Stats., appellant has *never* been shown to be dangerous, and yet he must prove that he is not dangerous to himself or others. Just how this burden is to be sustained is not clear. It is interesting to note that a person committed under sec. 971.17 can be released even though he is mentally ill, just as long as he can prove that he is not dangerous. Thus the defendant is first placed in the institution upon a showing that he was mentally ill at the time of the act, without a determination that he is dangerous at any time, and he can be released upon proving that he is not dangerous, without a determination being made that he is no longer mentally ill.

Not only has the legislature shifted the burden, it has shifted the basis for continuing commitment. The basis for commitment was mental illness while the basis for release is dangerousness. The rule discussed in *Speiser* and the other cases relied upon makes clear that such presumptions and change of burden are invalid. In the first instance the state must prove mental illness and dangerousness at the time of commitment, cf. *Lessard v. Schmidt, supra.* Unless and until that first burden has been sustained by the *state* it is improper and unconstitutional to place the burden upon the petitioner to negative the presumption assumed by the statutory scheme that he is both "mad and bad" — ill and dangerous. The rehearing provisions are hopelessly invalid.

II. The Mandate Of The Wisconsin Supreme Court Should Have Been Applied Retroactively.

A. The rehearing provisions do not suffice for the initial hearing.

The Wisconsin Supreme Court held that its determination that the commitment procedures are unconstitutional would be applied entirely prospectively and neither the appellant nor other persons committed under these invalid statutes would have their commitments vacated. The court based this determination on the availability of the rehearing provisions available under 971.17 (2), Wis. Stats., which were also attacked as being unconstitutional, but were upheld by the court.

It follows that if the appellant is correct in the immediately preceding section of the brief that the rehearing procedures are invalid, then the basis relied upon by the Wisconsin court has no viability. Thus if the Court notes jurisdiction and declares the rehearing provisions to be invalid, it will automatically apply the mandate to this appellant and other members of his class.

B. The declaration of unconstitutionality requires retroactive application.

It is also clear that the Wisconsin Supreme Court failed to follow its own cases and common law principles in denying the writ to the appellant. It is universally applied law that once a statute is declared invalid it is no longer effective, it is as if the law had not been passed, *State ex rel. Martin v. Zimmerman*, 233 Wis. 16, 21, 288 N.W. 454 (1939). It is quite certain that once the mandate of the Wisconsin Supreme Court had declared the statute invalid, such a statute could not be relied upon for any purpose or in any situation whatsoever, as the Wisconsin Supreme Court said in *John F. Jelke Co. v. Beck*, 208 Wis. 650, 661, 242 N.W. 576 (1932):

> "An unconstitutional act of the legislature is not a law. It confers no rights, imposes no penalty, affords no protection, is not operative, and in legal contemplation has no existence."

In accord: Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); *Richardson v. United States*, 465 F.2d 844, 850 (3rd Cir., 1972); *Hietl v. United States*, 415 F.2d 664, 666 (5th Cir., 1969).

It is thus apparent that by declaring the statute pursuant to which the appellant was committed to be unconstitutional, the court was required to declare his commitment invalid and grant the writ. This is particularly so in view of the invalidity of the rehearing provisions.

CONCLUSION

For the reasons argued herein it is respectfully submitted that the Petition for a Writ of Certiorari to the Wisconsin Supreme Court should be denied, and that probable jurisdiction should be noted by this Court to review the denial of the petition for a writ of habeas corpus.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-353

DR. EDWARD F. SCHUBERT,
Petitioner,

v.

MICHAEL JOHN KOVACH, JR.,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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NATURE OF THE CASE

The petitioner has heretofore filed a petition for writ of certiorari to the Wisconsin Supreme Court. The petitioner seeks review of the judgment of the Supreme Court of Wisconsin declaring the provisions of sec. 971.17 (1), Wis. Stats., which provide for the automatic commitment of those found not guilty of a crime by reason of mental disease or defect, to be violative of the United States Constitution.

The respondent has filed a brief in opposition to the petition for writ of certiorari. In part I of his argument in such

brief the respondent sets forth an argument not previously raised. Therefore, this brief is submitted in response to that argument pursuant to Rule 24 (4) of the Rules of the Supreme Court of the United States.

ARGUMENT

The Petitioner Ought Not Be Precluded On The Grounds Suggested By The Respondent From Seeking A Writ Of Certiorari To Review The Judgment Of The Wisconsin Supreme Court Herein.

The respondent contends that "the petitioner lacks standing to seek review of the order denying the petition for a writ of habeas corpus." In support of that contention he cites the rule stated by this Court in *Electrical Fittings Corporation v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939):

> "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree."

The respondent argues that that rule precludes the petitioner from seeking review of the judgment of the Wisconsin Supreme Court herein since that court's denial of the respondent's petition for a writ of habeas corpus constituted a judgment in favor of the petitioner from which the petitioner cannot appeal.

In making that argument the respondent overlooks the fact that the judgment of the Wisconsin Supreme Court in this case did more than simply deny to the petitioner a writ of habeas corpus. The judgment in this case provided as follows:

> "*By the Court.* — The provisions of sec. 971.17 (1), Stats., providing for automatic commitment without a hearing to determine present mental state and need for commitment, violate the equal protection and due process clause of the United States Constitution; determination of present mental illness shall be made in all prosecutions either pending or not instituted; other relief denied to this petitioner" (Appendix to Petition for Writ of Certiorari, pp. 112-113).

That judgment contains three provisions: 1) a declaration that the provisions of sec. 971.17 (1), Wis. Stats., providing for automatic commitment of persons found not guilty by reason of mental disease or defect, are unconstitutional;/[1] 2) a declaration that a hearing with respect to present mental illness was necessary in the future before any such commitment could be effected;/[2] and 3) a denial of other relief to the respondent herein./[3]

The petitioner seeks review by this Court of the first two provisions of the judgment. Those provisions of the judgment are clearly not in the petitioner's favor. The respondent, not the petitioner, was the prevailing party with respect to those two provisions of the judgment.

Therefore, the rule stated in *Electrical Fittings Corporation v. Thomas & Betts Co., supra,* which precludes appeal by a successful party, has no application to the petitioner's request for a writ of certiorari to review the judgment of

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/[1]While this case was an original action for a writ of habeas corpus in the Wisconsin Supreme Court, it is clear from the judgment set out above that the court treated such action, at least in part, as an action for declaratory judgment.

/[2]See fn. 1, *supra.*

/[3]It is noteworthy that in denying "other relief" to the respondent, the Wisconsin Supreme Court plainly implied its view that in the first two parts of its judgment it had granted relief to the respondent.

the Wisconsin Supreme Court. The petitioner, who was clearly the losing party with respect to those provisions of the judgment which he requests this Court to review, is not foreclosed by that rule from seeking such writ in this case.

It should be noted that if the petitioner were precluded in this case from obtaining review of the Wisconsin Supreme Court's declaration of the constitutional invalidity of sec. 971.17 (1), Wis. Stats., in all probability it would not be possible for the petitioner or any other interested party to obtain such review of that declaration by this Court in any future case. The trial courts of the state of Wisconsin can be expected to abandon the statutory procedures declared unconstitutional in this case and to comply with the new procedures mandated by the Wisconsin Supreme Court. Therefore, the opportunity to test the constitutional validity of those statutory procedures will in all likelihood never arise again.

In summary, the petitioner ought not be precluded on the grounds suggested by the respondent from obtaining a writ of certiorari to review the judgment of the Supreme Court of Wisconsin in this case. The petitioner was clearly the losing party with respect to those provisions of the judgment which he requests this Court to review. Furthermore, this case in all probability offers the only opportunity to obtain this Court's review of the Wisconsin Supreme Court's declaration that sec. 971.17 (1), Wis. Stats., is violative of the United States Constitution.

CONCLUSION

For these reasons and for the reasons heretofore set forth in the petition for writ of certiorari, the petitioner respectfully requests that this Court grant his petition for writ of certiorari to review the judgment of the Wisconsin Supreme Court herein.

Respectfully submitted,

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